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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROY GUINNANE
Petitioner,

V.

CITY AND COUNTY OF SAN FRANCISCO
PLANNING COMMISSION,
SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS,
BOARD OF PERMIT APPEALS,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of The State of California

CHARLES O. MORGAN, JR.
Law Offices of Charles O. Morgan, Jr.
450 Sansome Street
Suite 1310
San Francisco, CA 94111
Telephone: (415) 392-2037

Attorneys for Petitioner

34 pp

QUESTION PRESENTED

Whether a City Planning Commission denies equal protection of the law to a person applying for a permit to build a home, which complies in all respects to all applicable building, planning and zoning laws and has been found to have no significant environmental impact, when it denies the permit only after instituting a so-called "discretionary review" proceeding brought about because of neighborhood opposition to the home, which review is arbitrarily instituted against only such permit applications as the Commission decides in its sole discretion, where both the decision to review and the review itself are without any guidelines, being based solely on the Commission's discretion.

LIST OF PARTIES
RULE 28.1

The parties to the proceedings below were the petitioner Roy Guinnane and the respondents San Francisco Planning Commission, San Francisco Department of Public Works, and the Board of Permit Appeals.

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No.

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ROY GUINNANE,
Petitioner,

V.

City and County of San Francisco Planning Commission,
San Francisco Department of Public Works,
Board of Permit Appeals,
Respondents.

Petition for Writ of Certiorari to the Court Of Appeal Of The State of California

The petitioner Roy Guinnane respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division One, entered in the above- entitled proceeding on March 23, 1989.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, dated March 23, 1989 is reported at 209 Cal.App.3d 732 and appears in Appendix A hereto. The Order Denying Review After Judgment By The Court of Appeal of the California Supreme Court, dated June 7, 1989 is unreported and appears in Appendix B.

JURISDICTION

The California Supreme Court on June 7, 1989 denied review after the March 23, 1989 decision of the Court of Appeal. The petition for certiorari was filed within 90 days of the California Supreme Court's denial of review. This Court's jurisdiction in invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV.

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In June 1979, petitioner Roy Guinnane purchased four parcels of real property on Edgehill Road in San Francisco, California, for the purpose of eventually building a single-family residence on each lot. In the fall of 1980, Guinnane filed a building permit application for the construction of his own family home on one of the lots. This home was to be a single-family residence. As a result, a lengthy and extensive environmental review of all four lots began, not just a review on Guinnane's residence. Finally, the Department of City Planning decided that the development of all four lots owned by Guinnane would not have a significant effect on the environment, and issued a Negative Declaration so stating.

The Negative Declaration addressed concerns raised by various neighbors in the Edgehill Wood area that the development of four homes would cause traffic and parking congestion as well as create an adverse visual effect. The Negative Declaration found that these concerns were unfounded:

> Cumulative development on Edgehill could result in an estimated 110 daily and 11 peak hour trips. This traffic would represent an addition of approximately one vehicle every five to six minutes during the peak hour. It is unlikely that residents would perceive a traffic increase of this magnitude.
>
> The current plans for each unit include a driveway approximately 25 feet deep, in addition to the two-car garages which could accommodate parking for two automobiles. Therefore, the projects should not generate a substantial increase in parking demand off-site.

> The proposed project is located near the peak of the hill from which Edgehill Way derives it's name. Due to the nature of the site and the surrounding area, the project would not obstruct scenic view from public open space . . . Views from existing residences would not be obstructed.
>
> The heavily wooded Edgehill and nearby Mount Davidson are two of the hilly areas, characteristic of San Francisco, which provide visual relief and a sense of real open space in a fairly congested urban environment. To the extent that the project would replace views of the wooded hillside with residential development this urban amenity would be reduced. However, the proposed project, consisting of four lots, could not in itself substantially alter the current visual perception of the hillside . . .
> (Emphasis Added)

On November 14, 1985, the respondent Planning Commission upheld the Negative Declaration and adopted it as final.

During the lengthy environmental review, Guinnane's application for a building permit was inadvertently cancelled; therefore, Guinnane was required to reapply for a permit to build his family's home which had been already reviewed in the Negative Declaration. Although construction of his family home complied with all building and planning codes, the Planning Commission, as a result of the neighbors' protestations to the home, submitted the application to "discretionary review" and held public hearings. The neighbors only opposed the Guinnane family home because it would be more than twice the size of the average size of their homes and had five

bedrooms as opposed to the average of two to three bedrooms. Although Guinnane's home was to be larger than the existing homes in the neighborhood, it only occupied 26% of the property as opposed to the permitted 75%. In addition, the residence was only one story when viewed from the street because it rose gradually, without the use of stilts along the hillside in the rear Guinnane's home was consistent with the environment and character of the neighborhood as determined by the NegativeDeclaration. On September 25, 1986, after considering the clamor of neighbors, the Planning Commission relented to this opposition and rejected Guinnane's application under "its powers of discretionary review" basing its decision on the subject areas discussed in the Negative Declaration which Declaration the Planning Commission previously upheld and adopted.

The Planning Commission asserts that its so-called power of discretionary review is derived from Part III, Article 1, Section 26 of the Municipal Code which is totally unrelated and separate from the Planning Code.[1]

Even a cursory reading of Section 26 reveals that it only applies to a business or calling, not a single-family residence. Therefore, it was error to apply Section 26 to Guinnane's family residence.

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[1]Section 26 states: "Facts to be Considered by Departments." In granting or denying of any permit, or the revoking or refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding properties and upon its residence, and inhabitants thereof: and in granting and denying said permit, the revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked. (Emphasis Added)

On December 8, 1986, Guinnane filed a timely appeal with the Board of Permit Appeals which denied Guinnane any relief. On July 16, 1987, Guinnane filed a First Amended Petition for Writ of Mandamus in the Superior Court for the City and County of San Francisco asking the Court for an order directing Respondents to set aside their decisions and to approve of and issue the permit on the grounds that the Planning Commission acted in excess of its jurisdiction; that the discretionary review process denied him the equal protection of the laws and that there was insufficient evidence to support the finding. On October 1, 1987, Guinnane's claim for relief was denied.

Guinnane appealed to the Court of Appeal, First Appellate District of the State of California. In an opinion filed March 23, 1989, and included herein as Appendix A, Presiding Justice Racanelli affirmed the judgment on March 23, 1989, On the appeal, petitioner again raised the same grounds as he did in the Superior Court including the ground that the discretionary review process denied him the equal protection of the laws.

Thereafter, Guinnane timely petitioned the California Supreme Court for review of the Court of Appeals decision on the grounds that the Planning Commission exceeded its jurisdiction; denied him equal protection of the laws and that there was insufficient evidence. On June 7, 1989, the California Supreme Court filed its Order Denying Review After Judgment By The Court of Appeal, which is included herein as Appendix B.

The Court of Appeal concluded that the Planning Commission is vested with the power of discretionary review by mistakenly relying on *Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303 where the California Supreme Court upheld the discretionary review process which was applied to certain wartime emergency ordinances enacted to resolve the housing shortage. (p. A-6, infra) The Court of Appeal stated

that there was no denial of equal protection of law because it appeared that it was the Planning Commission's intent to submit all property in Edgehill Woods neighborhood to the process of discretionary review and that petitioner failed to meet his burden of showing unequal treatment. (p. A-10, infra)

The Court of Appeal further stated that the test for evaluating land use regulatory legislation is a reasonablerelationship to the accomplishment of a legitimate governmental interest and under this test, the Planning Commission has a legitimate interest in protecting the character of the area. (p. A-11, infra)

Finally, the Court of Appeal stated that specific standards are not necessary for the Planning Commission to exercise discretionary review and that the controlling standard is the exercise of sound discretion which is conduct neither arbitrary nor capricious but directed toward the public interest. (p. A-12, infra)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEAL ALLOWING THE PUBLIC TO DICTATE WHETHER OR NOT A PERSON SEEKING A RESIDENTIAL BUILDING PERMIT WILL BE SUBJECTED TO DISCRETIONARY REVIEW EVEN THOUGH THE RESIDENCE COMPLIES WITH ALL BUILDING REGULATIONS IS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

A. The Discretionary Review Process Is A Tool Whereby The Planning Commission Permits Public Opposition To Prevail Which Violates The Equal Protection Clause

The decision of the Court of Appeal upholding the discretionary review process of the Planning Commission allows mere public pressure to determine whether or not Guinnane can build his family home.

Although Guinnane's proposed residence complied with all of San Francisco's expansive building and planning regulations including but not limited to height and bulk limitations, maximum floor area ratios, use limitations, and zoning restrictions, the Planning Commission subjected Guinnane's application to the added burden of what is labeled "discretionary review." This was done in response to pressure from the Edgehill Wood neighbors who did not want a home built that was twice the average size of their homes. By submitting Guinnane's application to the added burden of this "discretionary review," the Planning Commission denied him equal protection of the laws.

The application of the discretionary review process dictated by public opinion cannot be tolerated. Whenever a proposal meets with the ire of the public, the publicly appointed Planning Commission cannot be permitted to arbitrarily employ a "discretionary review" process to deny the permit in order to appease its constituents. This Court has addressed this issue in *Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 87 L.Ed.2d 313, S. Ct. 3249 where this Court stated that neighbors' mere negative attitudes, or fear that is unsubstantiated by factors considered in a zoning proceeding cannot be permitted to require a special use permit for home for mentally retarded persons.

> It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737, 12 L.Ed.2d 632, 84 S. Ct. 1459 (1964), and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti* 466 U.S. 429, 433, 80 L.Ed.2d 421, 104 S. Ct. 1879 (1984).
>
> *Cleburne*, 473 U.S. at 448.

Guinnane has been denied his building permit to build a home for his family because of the biases of the property owners of the Edgehill Woods neighborhood against a home twice the average size of their homes. Property owners whose proposed homes receive little public attention would not be subjected to discretionary review, while those who received opposition would be.

The Court of Appeals erroneously relies on *Lindell Co. v. Board of Permit Appeals* (1943) 23 Ca1.2d 303 where the California Supreme Court upheld the application of discretionary review powers of the Board of Permit Appeals while certain wartime emergency ordinances were in effect to solve the housing shortage. At the time Guinnane sought the permit, no emergency ordinance was in effect. If the unique facts in Lindell do not distinguish it from those instances of seeking building permits under non-emergency conditions, it cannot stand because such application treats property owners seeking to build a family home dissimilarly.

B. The Right To Establish A Home Is A Matter Of Supreme Importance And Any Legislation Affecting This Right Is Subject To Heighten Scrutiny

While it is not clear if the right to establish a home is a fundamental right, Justice Marshall dissenting in *Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 87 L.Ed.2d 313, 105 S.Ct. 3249 noted:

> The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause.
>
> *Cleburne* at pg. 461.

Even if the right to establish a home is not a fundamental right it should be a right that is accorded the same importance as is the right to an education as set forth in *Plyler v. Doe* (1982) 457 U.S. 202, 72 L.Ed.2d 786, 102 S.Ct. 2382. As education is a matter of supreme importance, *Plyler* at pg. 221, the right to establish a home for one's family is a matter of supreme importance deserving of heightened scrutiny.

This Court has acknowledged on numerous occasions in a line of cases dating back to the seminal case of *Meyer v. Nebraska* (1923) 262 U.S. 390 the importance of the family, to marry, to raise children and to establish a home.

> Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right . . .to marry, establish a home and bring up children . . .
>
> *Meyer* at pg. 399.

Applying a higher standard of review, the discretionary review process is not substantially related to a legitimate governmental interest. The discretionary review process is not substantially related to maintaining the character of the neighborhood, to preventing any adverse environmental impact upon the neighborhood, and to aesthetics. In fact, even under a rational basis standard of review, the discretionary review process cannot withstand constitutional challenge. All issues regarding the character of the neighborhood, the environmental impact and aesthetics were addressed in the Negative Declaration. The neighbors opposed the Guinnane home on the basis of size which relates to aesthetics. Although regulating the aesthetics of a neighborhood is a legitimate governmental interest, the Negative Declaration already declared that the neighborhood would remain aesthetic in that views from existing residences would not be obstructed, and the home was consistent with the surrounding uses. Such a conclusion was easily supported in that the Guinnane home was to be only one story when viewed from the street and would not appear as a monolithic structure dwarfing the nearby homes, but consistent with the surrounding homes.

The Negative Declaration already found no significant environmental impact of the development of four homes, not just one. The report declared that scenic views from public open space would not be obstructed. Since all concerns which the government has a legitimate interest were addressed in the Negative Declaration, the discretionary review process served no purpose, and merely is a device whereby the planning Commission can succumb to public opposition without having to adhere to any guidelines or standards in the exercise of so-called discretionary review.

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.
>
> *Cleburne* at pg. 446.

Since the legitimate governmental interest has been satisfied by the preparation of the Negative Declaration, the discretionary review process is so attenuated from any legitimate goal as to render it arbitrary and irrational. The discretionary review process is not substantially or rationally related to any legitimate interest, but merely allows public disapproval to deny arbitrarily a permit for the building of one's family home.

C. The Exercise Of Discretionary Review Is Devoid Of Any Standards

The exercise of discretionary review is devoid of any guidelines or standards. The Court of Appeal asserts that the purpose statement of the Planning Code located in Article 1, Section 101 of the Code is the "basic standard" guiding the Planning Commission. The Court of Appeal states that in discharging its functions, the Planning Commission promotes "the 'public health, safety, peace, morals, comfort, convenience and general welfare.'"

Even if this purpose statement of the Planning Code could be considered a standard, it has no application to the discretionary review process at issue because the provision permitting discretionary review is found in Part III, Article 1, Section 26 of the Municipal Code, not in the Planning Code. Furthermore, application of Section 26 is incorrect because it only pertains to businesses, not residences.

Moreover, this purpose statement of the Planning Code cannot purport to be a standard by which the Planning Commission exercies discretionary review because it is only an itemization of concerns to be advanced. Generally, all laws seek to advance the public welfare. This purpose statement is no standard for the exercise of discretionary review. The failure to delineate standards by which the City could approve exceptions to uses permitted in local business zones was held unconstitutional by the Court of Appeals of Kentucky in *Kentucky Joint Planning Commission, et al. v. Taylor* (1978) 569 S.W.2d 679. There is no standard or principles which come into play when the Planning Commission elects to exercise discretionary review. The exercise of discretionary review is a device upon which the Planning Commission can hang its hat when there is enough public opposition to the issuance of a residential building permit. Such a practice denies a person seeking to build his family home the equal protection of the laws since not all permit seekers in the city are treated equally.

CONCLUSION

For all the above reasons, this Court should issue a writ of certiorari to review the judgment of the Court of Appeal.

Respectfully submitted,

Charles O. Morgan, Jr.
Counsel for Petitioner

APPENDIX A

[209 Cal. App. 3d 732]
[no. A040760, First Dist., Div. One, March 23, 1989]

ROY GUINNANE,
Plaintiff and Appellant

v.

SAN FRANCISCO CITY PLANNING COMMISSION, Et Al.,
Defendants and Respondents.

OPINION

RACANELLI, P.J.—In this administrative mandamus proceeding, plaintiff and appellant challenges the underlying decisions of defendants and respondents San Francisco City Planning Commission and Board of Permit Appeals denying a building permit to construct a four story, six thousand square-foot house with five bedrooms, five baths, and parking for two cars. We affirm for the reasons which we explain.

PROCEDURAL HISTORY

This is the second occasion in which plaintiff Roy Guinnane has appeared before this court concerning the subject property. In the earlier action prosecuted under a theory of inverse condemnation, we upheld the summary judgement granted in favor

of the City and County of San Francisco (*Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862 [241 Cal.Rptr. 787], cert. den. —U.S.— [102 L.Ed.2d 47, 109 S.Ct. 70] [Guinnane I].) We there noted that plaintiff's claim was premature and, in a footnote, suggested that his appropriate remedy for denial of the rested building permit was an administrative mandamus action. (197 Cal. App.3d at p.868, fn. 4.) It is from denial of a petition for administrative relief that this appeal has ensued.

FACTS

The factual history underlying the present action is set out in Guinnane I (at pp.864-865) and need not be repeated. It is undisputed that plaintiff's December 1985 application complied with the city's zoning laws and building standards.

During its 1982 environmental review process,the city planning commission in recognition of special circumstances pertaining to the Edgehill Woods area, adopted a resolution to exercise its "power of discretionary review" over proposed development in the area, including plaintiff's lots. Accordingly, the planning commission submitted plaintiff's application to it's "discretionary review" process resulting in a series of public hearings during the better part of 1986.[1]

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[1]The commission continued the hearings to afford the interested parties (plaintiff and the Edgehill way Neighborhood Association) an opportunity to reconcile their differences. The public hearing resumed when it became a clear that plaintiff would not compromise on issues of height, length or square footage of the house.

On September 25, 1986, the commission disapproved plaintiff's application finding that the proposed project was "not in character" with the surrounding homes.[2]

Thereafter, following formal denial by the central permit bureau, plaintiff appealed to the board of permit appeals. That body heard the appeal and eventually decided to deny the request permit. Appeal was perfected from the judgment below denying mandamus relief.

DISCUSSION

I. *Discretionary Review*

(1a) Plaintiff first contends the Planning commission had no authority to deny his building permit. He argues that because he complied with the city's zoning laws and building codes, he was entitled to the permit as a matter of right. The argument is unsound.

In *Wesley Investment Co. v. County of Alameda* (1984) 151 Cal.App.3d 672 [198 Cal.Rl.tr. 872], the plaintiff sought to establish a retail store, but his permit was denied even though such use was permitted under the applicable zoning ordinance. The denial was based on a "site development review" ordinance

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[2]The relevant findings are reported as follows: "[T]he Commission determines that the proposed height, length, area and bulk of the single family dwellings are not in character with the surrounding single family dwellings since the Project, as proposed, is significantly more massive and of a larger scale than adjoining dwellings.

.....

" 13. The Commission further finds that the intensity of development proposed by the Project is inconsistent with and would not promote the general and specific purposes of the Code provided under Section 101 in

which called for an exercise of discretion to "promote orderly, attractive, and harmonious development . . . by preventing establishment of uses . . . which are not properly related to their sites, surroundings . . .or their environmental setting."

This court (Div. III) held that the plaintiff's compliance with the zoning laws did not guarantee entitlement to a permit. The [zoning] ordinances do not provide for an unbridled right to erect a retail store in a C-1 zone. Rather, the listing of permitted uses in Ordinance Code section 8-48.1 is qualified by the provision in section 8-48.4 subjecting certain projects to site development review . . . . The fact that the site in question is in a zone where a retail store may be lawfully maintained does not diminish the county's power to determine that a particular development is not suitable for that location. (P. 678.)

Similarly, in thepresent case, plaintiff's compliance with the zoning laws and building codes did not entitle him to a building Permit as a matter of course. As will be seen, the city, acting through the planning commission and the board of permit appeals, was empowered to exercise discretionary review and to determine that the proposed residential development was unsuitable for the indicated location.

A. *Authority of the Planning Commission*

Under the San Francisco Municipal Code, the central permit bureau is the agency designated to issue building permits.(S.F. Pub...Wks. Code, art. 1, §§ 1, 2.) Upon receipt of

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that, as designed, the Project is inconsistent with and could not promote the general and specific pruposes of the code provided under Section 101 in that as designed, the Project would not contribute to the character and stability of the neighborhood and would not constitute a beneficial development due to its massive scale and incompatibility with the character of surrounding development.

an application, the central permit bureau transmits it to four other departments for their individual approval: the bureau of building inspection, the bureau of fire prevention and public safety, the fire marshal, and the city planning commission. (S.F. Pub. Wks. Code, art. 1, § 2.) The planning commission is thereby empowered to approve or disapprove any application for a building permit. (See *City & County of S.F. v. Superior Court* (1959) 53 Ca1.2d 236, 240 [1 Cal.Rptr. 158, 347 P.2d 294].)

The basic standard guiding the planning commission in discharging its function is the promotion of the public health, safety, peace, morals, comfort, convenience and general welfare." In particular, the commission is directed to "protect the character and stability of residential . . . areas . . . ." (S.F. Planning Code, art. 1, § 101; *City & County of S.F. v. Superior Court, supra,* 53 Ca1.2d at p.250.)

Under part III, article 1, section 26, of the Municipal Code, any city department may exercise its discretion in deciding whether to approve an application and in so doing, it may consider the effect of the proposed project upon the surrounding properties.[3]

This procedure was explicitly acknowledged by this court in *San Francisco Planning etc. Assn. v. Central Permit Bureau* (1973) 30 Cal.App.3d 920, 924 [106 Cal.Rptr. 670]. footnote 1: "In San Francisco an application for a permit is first submitted

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[3]Section 26 provides: "Facts to Be Considered By Departments. In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof, and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked."

to the central permit bureau. The bureaurefers the application to the various city departments and agencies concerned and these agencies review and report whether the project complies with the Code. Ordinarily, as long as the plans and specifcations for the project are in conformity with the applicable ordinances, a permit is issued as a a matter of course. However, the planning commission may invoke its discretionary power to review at a public hearing an application which nevertheless raises a signifcant question."

Indeed, in the early case of *Lindell Co. v. Board of Permit Appeals* (1943) Ca1.2d 303 [144 P.2d 4], the Supreme Court unequivocally recognized the power of discretionary review vested in the city's agencies: the Central Bureau is designated as the agency empowered to grant or refuse building permits (San Francisco Municipal Code, part II, chapter 1, Build, art. 3, secs. 55-56) and its scope of action is defined in the permit procedure regulation as follows: In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked. (Ordinance No. 3.0411, sec. 3: San Francisco Municipal Code, part III, art. 1, Permit Procedure, sec. 26.) This comprehensive language affecting the issuance of *all* permits sought under authority of the relevant San Francisco Charter and ordinance provisions in plain terms vests the granting power with a 'sound discretion' generally.' 23 Ca1.2d at p.311, original italics.)

In *Lindell* as here, the plaintiff sought a building permit to construct residential housing. The application was approved

approved by the central permit bureau but later denied by the board of permit appeals. The primary issue in *Lindell* was the discretionary power of the board of permit appeals. In upholding the power of the board, the court recognized that the first line of decision making—the central permit bureau—has coextensive powers of discretionary review (23 Cal.2d at pp. 313-314.)[4]

Currently, the power of the central permit bureau is delegated to the concerned agencies, including the planning commission. Since 1954, the planning commission has followed the practice of undertaking discretionary review pursuant to part III, article 1, section 26. The commission's interpretation of the ordinance was based on a 1954 city attorney opinion concluding that the commission, in granting or withholding its approval of building permit applications, could exercise its discretion and consider the effect of the proposed building upon the surrounding neighborhood.

(2) Such long-standing administrative interpretation of a statute by an agency charged with its enforcement and interpretation is entitled to great weight.(*Gay Law Students Assn. V. Pacific Te. & Te. Co.*(1979) 24 Ca1.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592]; *DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Ca1.2d 54, 61-62 [13 Cal.Rptr. 663, 362 P.2d 487].) (1b) We therefore conclude that pursuant to part III, article 1, section 26, the planning commission was fully authorized to exercise its independent discretion in deciding whether to approve the permit application.

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[4] We must reject plaintiff's argument that section 26 applies only to business permits. The holding and language of *Lindell* make clear that the section is "comprehensive" and affects "issuance of *all* permits."

B. *Authority of the Board of Permit Appeals*

Assuming, arguendo, that the planning commission lacked discretion to deny the permit, as plaintiff contends, the board of permit appeals undeniably possessed such power of discretion.

Section 3.651 of the San Francisco Charter provides in pertinent part: "Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused...." The charter provision unmistakably authorizes the board to hear and decide the ultimate question whether to grant or deny the application.[5]

Lindell early established that the board of permit appeals, is an administrative tribunal empowered to exercise full discretion in passing upon the matter as submitted for decision.

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[5] Plaintiff asserts that the board of permit appeals is limited to reviewing errors "in the enforcement of the provisions of any ordinance adopted by the board of supervisors..." (S.F. Charter, 3.651.) Plaintiff argues that since the city has never adopted an ordinance granting discretionary powers to the planning commission, the board of permit appeals has no jurisdiction to review the commission's decision.

But the language is quoted out of context and applies to *zoning* decisions. Other language within the same charter section gives broad powers to the board of permit appeals to review "a permit or license... denied...by the department authorized to issue same...."

... In view of such elaborate provision for the hearing on appeal it cannot be argued that the designated appellate board—the board of permit appeal—was in any way limited or restricted in its consideration of the instant case." (23 Cal.2d at pp.313-314.) As such, the board possesses "at least the discretion which the central permit bureau [has]." (*Id.* at p.314.) This discretion includes the power to determine whether a proposed project will..affect the public health, safety or general welfare." *(Ibid)*

Moreover, the Lindell court expressly rejected the notion that the board is limited to determining whether an applicant has met the requirements of the building permit ordinances. Instead, the court held the board has broad powers of de novo review. "In these circumstances the contention of the petitioner that the authority of the board of permit appeals was confined to a determination of whether there has been compliance with the municipal ordinances regulating permit procedure, as presumably found by the central bureau in granting the permit, is untenable. . . . In the present case, the board of permit appeals, invested by charter provision and related municipal ordinances with complete power to hear and determine the entire was free to draw its own conclusions from the conflicting evidence before it and, in the exercise of its independent judgment in the matter, affirm or overrule the action of the central permit bureau." (23 Cal.2d at pp.314-315: see also *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 906 [165 Cal.Rptr. 401].)

In summary, we conclude that both the planning commission (under pt. III, art. 1, § 26 of the Mun. Code) and the board of permit appeals (under § 3.651 of the city charter) are authorized to exercise independent discretionary review of a building permit application, the final authority being reposed in the board. Further, we conclude that such review is not confined

to a determination whether the applicant has complied with the city's zoning codes.

II. *Equal Protection*

Plaintiff also mounts a constitutional attack on the proceedings below. (3a) First, he argues, by being subjected to "discretionary review," he was treated differently from other property owners and thus denied equal protection of law.

But plaintiff presented no proof below of his asserted claim. He offered no evidence that other property owners were excluded or relieved from the discretionary review process. In fact, the 1982 resolution of the planning commission expressed the intent to submit all property in Edgehill Woods to the process of discretionary review.

We conclude that plaintiff has failed to meet his burden of proof of his claim of unequal treatment. (See *Iscoff v. Police Commission* (1963) 222 Cal.App.2d 395, 405-406 [35 Cal.Rptr. 189] [no showing of discriminaton in denial of permit].)

Next, plaintiff seems to argue that if part III, article 1, section 26, authorizes discretionary review by the planning, commission, the ordinance is unconstitutional because it is "unnecessary." Plaintiff asserts that because the planning commission had already reviewed the environmental effects of his proposed project in connection with the negative declaration, the discretionary review process itself was duplicative. Insofar as plaintiff's contention implies that the ordinance lacks a rational basis is meritless.[6] (4a) The test for evaluating land

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[6] Although framed as denial of equal protection, plaintiff's argument is fatally flawed by the absence of proof. Accordingly, we view the argument alternatively as a denial of substantive due process—i.e., that the ordinance lacks a rational basis.

use regulatory legislation has often been stated: "A law regulating or limiting the use of real property for the public welfare does not violate substantive process as long as it is reasonably related to the accomplishment of a legitimate governmental interest. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61, 68 [68 L.Ed.2d 671, 679, 101 S.Ct. 2176]: *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264 [217 Cal.Rptr. 1, 703 P.2d 339]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 158 [130 Cal.Rptr. 465, 550 P.2d 1001].) In *Schad v. Mount Ephraim, supra,* [452 U.S. 61] at page 68 [68 L.Ed.2d 671 at p. 680, (101 S.Ct. 2176)], the United States Supreme Court observed that 'the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.' 'Thus, an ordinance restrictive of property use will be upheld, against due process attack, unless its provisions 'are clearly arbitrary and unreasonable, having no substantial relation to public health.safety, morals or general welfare." ' " (*Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 103 [207 Cal.Rptr. 285, 688 P.2d 894].) (*Terminal Plaza Corp v. City and County of San Francisco* (1986) 177 Cal. App.3d 892, 908 [223 Cal.Rptr. 379]; see also *Leavenworth Properties v. City and County of San Francisco* (1987) 189 Cal.App.3d 986, 991 [234 Cal.Rptr. 598].)

(3b). Here, the discretionary review ordinance enables the city planning commission (or other relevant agency) to consider the effect of the proposed project upon the surrounding neighborhood, while the Planning Code prescribes the obligation of the commission to protect the character of the area. (4b) Such concerns for aesthetics have long been vindicated as governmental objectives. "The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri,* 342

U.S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (*Berman V. Parker* (1954) 348 U.S. 26, 33 [99 L.Ed. 27, 38, 75 S.Ct. 98]; see also *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 502 [69 L.Ed.2d 800, 811, 101 S.Ct. 2882]; *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215. Cal.Rptr. 439] [anti-"monotony" ordinance].)

(3c) Plaintiff suggests that the discretionary review ordinance is unfair because it grants uncontrolled discretion to the administrative body, a notion expressly rejected in *Iscoff v. Police Commission,* supra, 222 Cal.App.2d 395. In *Iscoff* the plaintiff challenged the denial of his application to transfer a pawnbroker's license, arguing in part that San Francisco's discretionary review ordinance granted excessive power to the licensing agency and failed to provide appropriate standards of guidance. The court held, however, that specific standards were unnecessary and that the controlling standard applicable to the licensing agency was the exercise of sound discretion—that is, discretionary conduct which is neither arbitrary nor capricious but directed toward promoting the public interest. (*Id.* at p.405: see also *Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 71-72 [101 Cal.Rptr. 768, 496 P.2d 840].) We find no constitutional infirmity in the discretionary review ordinance as argued or suggested.

III. *Sufficiency of the Evidence and Findings*

(5a) Finally, plaintiff contends that the evidence does not support the findings of the planning commission as adopted by the board of permit appeals, and that the findings fail to support

the adverse decisions of both the commission and the board. These contentions must be rejected.

A. *Sufficiency of the Evidence*

(6) (See fn., 7.) , (5b) Plaintiff argues that the commission's findings are directly contrary to the negative declaration issued by the city agency and therefore lack evidentiary support.[7]

The negative declaration concluded that the proposed building of four homes on plaintiff's four lots would not have significant adverse effects of the environment. Specifically, the negative declaration concluded because there would be no substantial impact upon traffic, parking, or scenic views from other residences or from the open space, an environmental impact report was not required.

However, in denying plaintiff's building permit, the planning commission found that the construction of a 6,000 square-foot house would increase traffic, create parking problems and have an adverse visual effect in that the large size of the proposed dwelling was incompatible with the character of the neighborhood.

As respondents point out, the environmental review process is not the same as the permit approval process. In the environmental review process, the fundamental issue is whether the proposed project would have a significant environmental impact warranting a detailed study in the form of an environmental impact report. The city's negative declaration resolved that

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[7]We must decline plaintiff's invitation to exercise our independent judgement and make findings contrary to those of the commission. The proper standard governing our review is the substantial evidence test. (*Paoli v. California Coastal Com.* (1986) 178 Cal.App.3d 544, 550-551 [223 Cal.Rptr. 792].)

issue but did not resolve the question whether the building permit application should be approved. An environmental review document is an informational document, not a decision-making document.

In denying the permit, the commission went beyond environmental concerns and focused on the suitability of the project within the affected neighborhood. Those relevant findings (see fn. 2, ante)—the massive scale of the proposed project and its incompatibility with the character and stability of the residential neighborhood—amply supported its determination.

We find nothing inconsistent between the negative declaration and the administrative decision to deny the requested permit.

B. *Sufficiency of the Findings*

Plaintiff's contention that the commission's decision is unsupported by the findings is based on the argument that the findings relate exclusively to private concerns of the neighbors (traffic, parking and visual impact) than the requisite public concerns of health, safety and welfare. This argument is specious while parking, traffic and visual impact were expressed by some of the neighbors, clearly they represent concerns that fall well within the domain of the public interest and welfare. (E.g., *Metromedia, Inc. v. City of San Diego* (1980) 26Cal.3d 848, 858 [164 Cal.Rptr. 510, 610 P.2d 407], revd. on other grounds, 453 U.S. 490 [69 L.Ed.2d 800, 101 S.Ct. 2882]: *Sunset Amusement Co. v. Board of Police Commissioners*, supra, 7 Cal.3d at p.76.)

The judgment is affirmed.[8]

Newsom, J., and Stein, J., concurred.

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[8]In light of our determination, we find it unnecessary to reach respondents' remaining arguments relating to the statute of limitations and exhaustion of administrative remedies.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGEMENT BY THE COURT OF APPEAL
First Appellate District, Division One, No. A040760
S010055

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROY GUINNANE, Appellant

v.

SAN FRANCISCO CITY PLANING COMMISSION Et. Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice